FILE COPY

Office - Supreme Court, U. S.
FILED
OCT 6 1947
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. ~~12~~ 6, Original

UNITED STATES OF AMERICA,

Plaintiff

vs.

STATE OF CALIFORNIA,

Defendant

BRIEF OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, AMICUS CURIAE, IN SUPPORT OF THE DEFENDANT'S PETITION FOR A REHEARING AND OBJECTIONS TO THE PLAINTIFF'S PROPOSED DECREE.

THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL
COMMITTEE ON THE BRIEF:
WALTER R. JOHNSON,
Attorney General of Nebraska, Chairman
CLARENCE A. BARNES,
Attorney General of Massachusetts
PRICE DANIEL,
Attorney General of Texas
HUGH S. JENKINS,
Attorney General of Ohio
FRED S. LeBLANC,
Attorney General of Louisiana
EDWARD F. ARN,
Attorney General of Kansas.

INDEX

Page

STATEMENT 1

ARGUMENT 4

OBJECTIONS TO PROPOSED DECREE..... 4

I. Since, in the majority opinion, the terms "paramount rights" and "dominion" are not used in the proprietary sense of present ownership by the Federal Government, the Government's proposed decree of present "proprietorship in the lands" of the marginal sea of California and for injunction should be denied..... 4

Proprietorship 4

Injunctive Relief 8

IN SUPPORT OF REHEARING..... 10

II. The assumption in the majority opinion that full dominion and control over natural resources is an incident to paramount rights and powers of the Federal Government in national defense and external affairs is wholly without support of law, constitution or decisions, and it was error to conclude that exercise of such exclusive dominion is necessary in defending and preserving the security and tranquillity of the people of this nation..... 10

III. One hundred and seventy-one years of experience proves that error lies in the statement that "the state is not equipped in our constitutional system with the powers or the facilities for exercising the responsibilities which would be concomitant with the dominion which it seeks." 19

IV. Within constitutional bounds, the extent of Federal dominion and regulatory control over lands and resources is a matter of policy for Congress to decide, and the court erred in expressing an opinion on rights and powers which Congress has refrained from asserting. 21

Page

V. The disputed property being within the admitted boundaries of California, the Court erred in applying international law rather than the Constitution and law of the United States in determining the extent of the power and control due the Federal as against the State Government. 23

VI. The Court erred in failing to follow the rule of fifty-three former Supreme Court decisions holding that the respective states own all lands beneath navigable waters within their boundaries, and in attempting for the first time to limit such rule to inland waters. 26

VII. By basing its opinion on the assumption that the three-mile limit was unsettled when this nation was formed, the Court erred in refusing to recognize the title of the Original States to *any* lands in their respective maritime belts. 36

CONCLUSION 39

CASES CITED

Arnold v. Munday (1821), 1 Halstead (6 N. J. Law) 1.. 36

Ashwander v. Tennessee Valley Authority (1936), 297 U. S. 288..... 33

Barney v. Keokuk (1876), 94 U. S. 324..... 31

Borax Consolidated v. Los Angeles (1935), 296 U. S. 10.. 33

Brown v. Spillman, 155 U. S. 665..... 27

Helvering v. Fitch, 309 U. S. 149..... 35

Illinois Central Railroad Co. v. Illinois (1892), 146 U. S. 387 .....32, 35

Johnson v. McIntosh (1823), 8 Wheat. 543..... 24

Jones v. United States, 137 U. S. 202..... 24

Kohl v. United States (1875), 91 U. S. 367, 23 L. Ed. 449. 27

Page

Louisiana v. Mississippi, 202 U. S. 1..... 25

Manchester v. Massachusetts, 139 U. S. 240.....19, 21, 34

Martin v. Waddell (1842), 16 Peters 367.....31, 36

Ohio Oil Co. v. Indiana, 177 U. S. 190..... 27

Pollard v. Hagan, 44 U. S. 212.....23, 27, 28, 35

Rhode Island v. Massachusetts (1828), 12 Peters 657.... 26

Scott v. Lattig, 227 U. S. 229..... 21

Screws v. United States, 325 U. S. 91..... 35

Shively v. Bowlby, 152 U. S. 1..... 31

Skiriotes v. Florida, 313 U. S. 69.....19, 21, 24

State of New York, et al., v. United States, 326 U. S. 572, 66 S. Ct. 310.....15, 17

The Case of the Royal Fishery of the River Banne, Dav. 55, 80 Eng. Rep. 540..... 29

Truly v. Wanzer (1847), 46 U. S. 141..... 10

United States v. Butler, 297 U. S. 1.....12, 18

United States v. Chandler-Dunbar Co. (1908), 209 U. S. 447 .....17, 33

United States v. Curtiss-Wright Export Co., et al., 299 U. S. 304.....24, 25

United States v. Guaranty Trust Co., 33 F. (2d) 533, affirmed 280 U. S. 478.....28, 35

United States v. Holt State Bank, 270 U. S. 49..... 21

United States v. Rodgers, 150 U. S. 266..... 17

United States v. Standard Oil Co., 67 S. Ct. 1607..... 22

United States v. State of California, 67 S. Ct. 1658.....1, 2, 11, 13, 14, 15, 20, 22, 25, 28

United States v. Williams, 194 U. S. 279.....12, 18

Weber v. Board of Harbor Commissioners (1873), 18 Wall. 57 31

TEXTBOOKS AND ARTICLES

Page

15 C. J. 953 28

Gould, "Waters" (Chicago, 3rd Edition 1900) p. 100 29

Keeton, "Federal and State Claims to Submerged Lands," 25 Tex. Law Rev., January, 1947, p. 262 35

1 Kinney, A Treatise on the Law of Irrigation and Water Rights (San Francisco, 2nd Ed. 1912) p. 526 30

Wilson, W. "Constitutional Government of the United States," p. 191 18

FEDERAL STATUTES

33 U. S. C. A., Section 403 14

EXECUTIVE ORDERS

Executive Proclamation 2667, September 28, 1945, 10 F. R. 12303 13

Executive Order 9633, 10 F. R. 12305 13

MISCELLANEOUS

92 Congressional Record, 10660 (1946) 23

Constitution of the United States 18

H. J. Res. 225, 79th Congress, 2d Sess. (1946) 22

Raleigh Grant of 1584 37

Rhode Island General Assembly Act of 1798 37

Sheppard's Citations 28

S. J. Res. 83 and 92, 76th Cong., 1st Sess. (1939) 22

S. J. Res. 208, 75th Cong., 1st Sess. (1938) 22

Treaty of Peace with Great Britain (1783) 37

Virginia Charter of 1611 37

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 12, Original

UNITED STATES OF AMERICA,

Plaintiff

vs.

STATE OF CALIFORNIA,

Defendant

BRIEF OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, AMICUS CURIAE, IN SUPPORT OF THE DEFENDANT'S PETITION FOR A REHEARING AND OBJECTIONS TO THE PLAINTIFF'S PROPOSED DECREE.

STATEMENT

This Honorable Court handed down its decision herein on June 23, 1947, in favor of the United States and against the State of California, not on Plaintiff's allegation of fee simple ownership, but on the Government's alternative plea of "paramount rights in and power over" certain disputed land within the boundaries of California.[1]

---

[1] 67 S. Ct. 1658.

Having been permitted to file a brief on the merits, as amicus curiae, the National Association of Attorneys General, desires to supplement its effort by filing this brief in support of the Defendant's Petition for Rehearing and Objections to the Proposed Decree.

The several states are greatly alarmed by the decision herein rendered, and this brief is not filed as a mere matter of form or for delay. With due respect, it is filed to urge our conception of the errors in the majority opinion and the compelling need for a rehearing.

That all of the states, both coastal and inland, should be concerned, is obvious from the fact that the majority opinion giving the Government full regulatory control over the natural resources of the disputed land is not based at all upon ownership by the Federal Government, but solely upon the paramount right of the national sovereign to defend that land and conduct international relations which may concern the area. This paramount right is not limited to coastal areas.

The entire theory of the opinion is based on the Federal Government's control of national defense and external affairs,[2] the exercise of which extends throughout the territory of the United States and flows from an inseparable power. To limit the theory is to destroy it. Evidently the majority of this Honorable Court took the same view, for the majority opinion not only treats the rights and power of the United States in the lands of the marginal sea as paramount, but it describes the title of a state to lands underlying inland navigable waters as "qualified.'"

---

[2]U. S. v. State of California, 67 S. Ct. 1658, 1663(9).

[3]U. S. v. State of California, 67 S. Ct. 1658, 1664 (10).

State officials have always had deep interest and alarming concern over this case, but more so now that the opinion speaks of exclusive control ("full dominion") based on acknowledged Federal powers which have never required such exclusive control, and since the Government in its Proposed Decree is now asking for even more relief (complete ownership) than the majority opinion would grant.

The titles specifically clouded by this decision, though heretofore unquestioned for more than 100 years, are held under a general rule of law expressed at least 53 times by this Court, 244 times by State and Federal Courts, 49 times by Attorneys General of the United States, and 31 times by the Secretary of Interior.[4] Such lands cover 65,000 square miles of territory within the admitted boundaries of coastal states, an area larger than the five New England States. Twice that amount of land lies beneath inland navigable waters of the states, is subject to the same paramount federal powers, and clouded by the principles announced. Little comfort can come from the fact that the Government is not now seeking judgment for "full dominion" over these inland waters. Only the present Attorney General and his predecessor asserted claim to the marine belt of the states. The next Attorney General may assert claim to the inland waters, using this case as a controlling precedent.

Most important of all, the principles of this decision are not limited to mere property rights. Its doctrine of "full dominion"[5] as an incident to certain

---

[4]See California's brief on merits for citations, pp. 88, 117-126.

[5]Used in the general sense of "control, regulation, authority."

Federal regulatory powers which apply to all public and private property in the Nation could be used as an opening wedge for nationalization or Federal control of all land uses and natural resources. This, in spite of the fact that such exclusive control goes far beyond the extent necessary for proper exercise of the delegated paramount Federal powers.

The states realize, of course, that their disastrous plight under the decision herein rendered is no persuasive factor to be considered in passing upon the merits of Defendant's petition for rehearing; however, the Court will understand from the foregoing statement that only the most profound interest of the states in the subject matter of this action underlies the preparation of this brief and justifies its filing.

ARGUMENT

OBJECTIONS TO PROPOSED DECREE

I.

Since, in the majority opinion, the terms "paramount rights" and "dominion" are not used in the proprietary sense of present ownership by the Federal Government, the Government's proposed decree of present "proprietorship in the lands" of the marginal sea of California and for injunction should be denied.

Proprietorship

Obviously, no member of the concurring majority meant to hold by the opinion of June 23rd, 1947, that the National Government now holds fee simple title to the land in dispute. If so, Plaintiff would have been declared the full owner of the lands involved, and we would find in the opinion a full disclosure of

how and *when* title was acquired. Moreover, it would not have been necessary to base a decision on "paramount rights and power" if the United States had been declared the owner of the lands. We have searched every word of the opinion for an expression that might indicate an intention of holding that the Government now *owns* the disputed property. We find none.

The Complaint alleges that the United States "is the *owner in fee simple of, or possessed of paramount rights in and power over,* the lands."[6] It was on the latter alternative plea of "paramount rights in and power over" that the entire decision for the Government is based. The opinion does not adopt any portion of the Government's allegation and elaborate argument that this land belongs to the United States in a proprietary sense.

In fact, the majority opinion dismisses the necessity for such finding and negatives any intention of such a holding by adopting only the alternative theory of the Government and stating the question on the merits in the following words:

> "The crucial question on the merits is not merely who owns the bare legal title to the lands under the marginal sea. The United States here asserts rights in two capacities transcending those of a mere property owner. . . . In light of the foregoing, our question is whether the state or the Federal Government has the *paramount right and power* to determine in the first instance when, how or by what agencies, foreign or domestic, the oil

[6]All emphasis supplied unless otherwise indicated.

and other resources of the soil of the marginal sea, known or hereafter discovered, may be exploited."

Throughout the opinion the majority appears to have carefully and studiously avoided any holding of present ownership or proprietorship in the property. The majority finds only "paramount rights and powers" to control the uses made of the land and its resources by future affirmative action of the Government through its Legislative Branch.[7]

A contrary construction of the opinion, or confusion as to what it means, could arise only from the use of the words "full dominion" and the fact that injunctive relief was held proper. In light of the foregoing plain and unambiguous words of the Court, it cannot be thought that the term "dominion" was used in the present proprietary sense of ownership. Rather, the term seems to have been used in its general meaning of "power over" or "control." Webster lists the words "control, rule, authority and jurisdiction" as synonyms of the word "dominion." When used in the majority opinion, the word is clearly subordinate and incident to the "paramount powers" spoken of and not in addition to or something else than

[7]The Government puts the same construction on the opinion in the Stipulations filed herein and in letter from the Attorney General to the Secretary of Interior, August 29, 1947, recognizing that the lands in question cannot be leased or developed by a Federal agency unless Congress passes a statute authorizing same; and in the suggestion that the parties expect legislative action pertinent to the subject matter of this litigation, and that injunctive relief should "be attuned to anticipated Congressional action." (See pages 4-5, Memorandum in Support of Proposed Decree.)

such powers. This is evident from the following final statement of the Court's opinion:

> ". . . the Federal Government rather than the state has paramount rights in and power over that belt, *an incident to which is* full dominion over the resources of the soil under that water area, including oil."

Had the majority intended the word "dominion" as synonymous with "proprietorship" or "ownership," it would have been unnecessary to condition it upon or speak of it as "incident to" other rights and powers.

In spite of the fact that the Court has limited its opinion to "dominion" in the sense of authority to regulate or control, the Government now asks the Court to add the word "proprietorship" in its decree in favor of the United States.[8]

Obviously recognizing that the majority opinion has refused to adopt its allegation of present *ownership,* the Government now wishes the Court to add a word to its alternative allegation[9] so as to mean the same thing as the rejected primary allegation, and thereby accomplish what the Court clearly refused to do in its opinion. (Compare 9 and 10 below) That "proprietorship" is something additional and different from the Court's use of the word "dominion" is evidenced by the desire of the Government that the term

---

[8]Paragraph 1, Proposed Decree filed herein by the United States.

[9]The alternative allegation in Original Complaint reads "or possessed of paramount rights in and powers over, the lands."

be placed in the decree in addition to the word "dominion."[10]

"Proprietorship" is in legal terms synonymous with fee simple ownership and exclusive control. Since the Government is interpreting the use of the terms "paramount rights" and "dominion" in the opinion to mean ownership and is seeking that it be so decreed in the language of "proprietorship," and since other confusion may arise if the Court's true meaning of the terms is not written into the decree, it is respectfully urged that the Court clarify the matter in the decree entered, as follows:

1. Omit the words "of proprietorship" in line three of numbered paragraph 1 of the Proposed Decree.

2. Add this sentence at the end of numbered paragraph 1 of the Proposed Decree: "The United States does not at this time own fee simple title or exclusive proprietorship in said property."[11]

Injunctive Relief

Because the Court's opinion does not find present ownership or "exclusive proprietorship" in the Federal Government, it is respectfully urged that the majority has erred in holding that plaintiff is entitled to

---

[10]Proposed Decree reads "The United States of America is now . . . possessed of paramount rights of proprietorship in, and full dominion and power over, the lands."

[11]Or, in the alternative: "The term 'dominion' is used in this Decree, as in the original opinion, in the sense of power and control and not in the sense of exclusive proprietorship," or any other wording which will properly speak the Court's intention on this important point.

injunctive relief, if in fact the majority intended to include such holding in the general terms, "the United States is entitled to the relief prayed for."

The relief prayed for in the Complaint (p. 11) was "that a decree be entered adjudging and declaring the rights of the United States as against the State of California in the area claimed by California and enjoining the State of California and all persons claiming under it from continuing to trespass upon the area in violation of the rights of the United States."

After all, this land admittedly is still within the boundaries of the State of California, and the entire area is included within the boundaries of coastal counties and cities of that State. State officials and officials of counties and cities holding under the State, owners of wharves, piers, hotels, and thousands of acres of kelp leases, are going upon the property daily without any interference with or violation of the paramount rights of the Government to defend the shores, promote navigation, or conduct international affairs. There is no evidence of the slightest violation of the rights of the United States as decreed by the Court except in the taking of oil, the continuation of which the Government has stipulated and agreed to.[12] In this connection, the Government's Memorandum in Support of Decree (p. 4) suggests that injunctive relief "would, of course, be inappropriate," and that such relief should be withheld until it can be "attuned to anticipated Congressional action." (p. 5)

At another place in the Memorandum (pp. 4-5), the Government says, "And no facts now known to

[12]Stipulations on file herein between the parties. Appendix B and C of Proposed Decree filed herein by the Plaintiff.

the Government give rise to a present necessity for injunctive relief in other situations."

Therefore the case presents no evidence justifying numbered paragraph 2 of the Proposed Decree, to wit: "The United States is entitled to the injunctive relief prayed for in the Complaint." It is elementary that a Court will not decree that a party is presently entitled to injunctive relief conditioned on certain facts possibly arising in the future, not presently threatening or imminent.[13] A decree of "present exclusive ownership" in the National Government or a finding that California and its officials and grantees are presently trespassing upon and violating the present rights of the United States, would be the only justification for a decree that the Government is now entitled to injunctive relief.

For the reasons stated, it is respectfully submitted that numbered paragraph 2 of the Proposed Decree should be changed to read:

> "2. The United States is not entitled to the injunctive relief prayed for at this time."

IN SUPPORT OF REHEARING

II.

The assumption in the majority opinion that full dominion and control over natural resources is an incident to paramount rights and powers of the Federal Government in national defense and external

[13]In Truly v. Wanzer (1847), 46 U. S. 141, the Supreme Court stated that injunction should not issue unless the "right" be "clear", *"the injury impending* and threatened so as to be averted only by the protective preventative process of injunction."

affairs is wholly without support of law, constitution or decisions, and it was error to conclude that exercise of such exclusive dominion is necessary in defending and preserving the security and tranquillity of the people of this nation.

We heartily concur in the Court's refusal to hold that the Federal Government *owns* the disputed property, but we respectfully except to the Court's assumption that certain paramount rights in and power over the land denotes full "dominion" or complete control of the land and its resources. We contend that, no matter how comprehensive and necessitous the obligations of the United States, they can be fulfilled without the exercise of *full* dominion over the lands mentioned.

It is freely admitted that the Federal Government has certain delegated paramount powers over the navigable waters and other property within a state, including the two rights and powers on which this opinion is based, i.e., (1) to defend the shores and (2) conduct international relations. Commerce and navigation is a third power mentioned by the Court.

On the other hand, it is earnestly contended that the State also has some rights and powers over this land within its boundaries, and that the Government is in no event entitled to "full" dominion (exclusive control) over such property to the exclusion of state powers which in no way interfere with defense, commerce, navigation, or international relations.[14] All

[14]The majority opinion at one point admits that the State has local police power functions which "do not detract from the Federal Government's paramount rights in and power over this area." 67 S. Ct. 1658, 1667 (14).

powers unnecessary in the exercise of the constitutionally delegated Federal powers are held by the state under the specific provisions of the Tenth Amendment to the Constitution.[15]

To illustrate the error of the Court in decreeing complete control ("*full* dominion") in the Federal Government, let us list some of the many powers which are being exercised by the State Governments over land within their boundaries below low tide along the coast:

(1) Regulation of surf bathing and playgrounds.
(2) Regulation and fees for fishing and shrimping.
(3) Leases on and development of oyster beds.
(4) Leases on and development of kelp beds.
(5) Building and operating piers. (Pleasure and fishing)
(6) Collection of taxes on property built upon, in or over such land.
(7) Leases on and production of oil.
(8) Leases on and recovery of sand, shell, and gravel.
(9) Conservation and proration of oil production.

Is the State's exercise of any of the above rights or powers in that part of the ocean within its boundaries interfering in any way with the defense of the shore, navigation of the waters, or agreements with other nations? Admittedly not. The Government agrees to this in its Memorandum in Support of Proposed Decree (p. 4-5) when it says, "And no facts now known to the Government give rise to a present necessity for injunctive relief."

---

[15]U. S. v. Williams, 194 U. S. 279, 295; U. S. v. Butler, 297 U. S. 1, 68.

How does it happen that California's possession and use of the property and the above or similar powers for 97 years (and other states for 171 years) is without conflict or interference with defense, navigation, or external affairs? The answer is crystal clear. California's use of the above property and powers has always been, and must always remain, subject to all necessary control and regulation of Congress and the War and Navy Departments for protection of the coast and non-interference with navigation and subject to treaties made and regulations of the State Department concerning other nations or nationals.

The dual sovereignties always heretofore have operated with due respect for each other's relative rights and powers in navigable waters of all the states.[18] Anyone who leases an oyster or kelp bed knows that it is subject to destruction by the Navy or Army in mining the waters in time of War or by the War Department in digging a new channel for navigation. No pier, structure, or oil derrick can be placed within or upon

---

[18]None of the assertions of national dominion listed in the majority opinion "as binding upon this Court" could be considered as assertions of "full" control or complete "dominion." Neither are they in conflict with qualified state ownership of the soil. They deal specifically with neutrality, migratory fish, pollution, smugglers, and enforcement of the Prohibition Act. (67 S. Ct. 1658, 1665-66, fn. 18.) Never in the history of this nation has any previous assertion of exclusive control of resources or ownership been made by Congress or any agency of the Executive Branch of the Government in such areas.

The President's "continental shelf" proclamation (Exec. Proc. 2667, Sept. 28, 1945, 10 F. R. 12303) was cited as an assertion of dominion, but the simultaneous Executive Order 9633, 10 F. R. 12305, was evidently overlooked. This Order asserts only such "jurisdiction and control" as may be necessary for federal purposes, "pending the enactment of legis-

the area without a permit from the War Department to assure that navigation will not be impeded.[17]

Which of the above-listed state uses and powers does this Court believe should be taken away from the state as an incident of Federal rights and powers, even though they interfere with no exercise of the paramount Federal powers and are necessary to no exercise of such powers? The answer, we hope, is none. And yet, the majority opinion and the Proposed Decree of "full dominion and power over the lands, minerals," etc., would divest the State of all rights, powers and control over that portion of her territory.

The theory that full dominion is an incident to such rights and power is a mere assumption, never before advanced, and is not supported by any constitutional provision, statute or former decision.

The use made of the words "full dominion," or the inference we draw from that application of the term, reflects patent error. The declaration is made in the majority opinion that "the crucial question on the merits is not merely who owns the bare legal title to the lands under the marginal sea."[18] Therefore, as stated in Point I, the question of absolute ownership was completely relegated to other considerations.

---

lation," and specifically states that the Proclamation and Order shall not affect the issues in this case, in the following words:

> "Neither this Order nor the aforesaid proclamation shall be deemed to affect the determination by legislation or judicial decree of any issues between the United States and the several states, relating to the ownership or control of the subsoil and sea bed of the continental shelf within or outside of the three-mile limit."

[17]33 U.S.C.A., Sec. 403.

[18]U. S. v. State of California, 67 S. Ct. 1658, 1663(9).

With due respect, it seems inescapable that the Court erred in failing to recognize the ownership issue as prevailing and decisive, or it erroneously described full dominion as an incident to paramount rights and power. Three significant factors show that the theory pronounced in the majority opinion is insupportable, both in law and logic, and therefore reflects error.

First, the majority opinion appears to emphasize that the exercise of paramount rights in and power over lands in the marginal sea is necessary when dangers arise to disturb the security and tranquillity of the people of this nation. But why the Federal Government's right to exercise paramount powers in times of emergency should defeat a state's claim of fee title, the majority opinion fails to explain. So we unhesitatingly say that this theory based on the contingency that "should it ever again become impossible to preserve that peace"[19] has been misapplied.

In considering the highly remote possibilities of the Federal Government having to take control of all the resources in lands of the marginal sea for the purpose of saving the national security and defending the lives of our citizens, thereby requiring cancellation of all obligations of lease, we are reminded of the language this Court used in the case of State of New York, et al. v. United States, 326 U. S. 572, 66 S. Ct. 310, 314:

> "The process of constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world and devising doctrines sufficiently comprehensive in detail to cover the remotest contingency."

---

[19]U. S. v. State of California, 67 S. Ct. 1658, 1666.

Secondly, the Court's portrayal of exigencies that give rise to the timeliness of exercising such rights and power does not restrain the Federal Government from proceeding at once to take and use the petroleum resources of the lands in the marginal sea, or by contract to permit others under their recognized dominion to do so. We find nothing in the decision to indicate that the exercise of such paramount rights and power is prospective only and depends upon the occasion when dangers arise to threaten our security and tranquillity. The immediate privilege of exercising such rights and power for peaceful purposes and profit appears incompatible with the reasons given in support of the Court's theory, and it seems to us that unless the Federal Government is restrained by a change in this decision from making use of such resources until the exigencies enunciated by this Court are occasioned, the whole theory falls. The theory provides no such restraint and, therefore, it reflects grave error in its pronouncement as law.

Thirdly, the possession by the Federal Government of paramount rights in and power over lands in the marginal sea necessarily implies subordinate ownership in another. The Court refutes state ownership of said lands and fails to hold that fee simple title is vested in the Federal Government. We know not whose property is subservient to a paramount right and power. The only reasonable basis on which this theory can be clarified and made to apply within legal bounds is to treat those rights and powers called "paramount" as being an equivalent expression of the constitutional powers of the Federal Government to regulate. But a rehearing would be necessary to accomplish that end.

Protection does not imply full dominion, and the possession of proprietary rights are unnecessary in dealings with foreign governments over boundaries.[20] It is axiomatic that the United States will protect the property it owns. But that sovereign has a more important and compelling obligation to protect the property of the people of the nation in which the Federal Government has no proprietary interest. The exercise of regulatory powers is sufficient to curb use of property by the state in a manner that is repugnant to the needs of the common welfare. Nothing could imperil the national security and tranquillity any more than to effect loss of confidence in state sovereignty and to deprive the states of indispensable and long-existing sources of revenue and their citizens the means of livelihood. After all, the common welfare depends upon state stability,[21] for therein the people of our nation

---

[20]A contrary contention was declined as "no plausible ground for the claim of the United States" in a unanimous opinion written by Mr. Justice Holmes in 1908. United States v. Chandler-Dunbar Co., 209 U. S. 447. Therein the Government claimed title and control of the bed of navigable waters connecting the Great Lakes under the recognized principle that such lakes "are high seas" (U.S. v. Rodgers, 150 U.S. 266) and that a different rule should apply to them because they are "international waters" and located on the outer boundary of the nation and adjoin a foreign power. If exclusive dominion over these "high seas" on which great naval battles have been fought with the adjoining sovereign is unnecessary for national defense and international relations, then it is certainly unnecessary on submerged lands thousands of miles from the nearest foreign power.

[21]State of New York et al. v. United States, 326 U. S. 572, 66 S. Ct. 310; dissenting opinion of Mr. Justice Black, page 319:

> "Local government in this free land does not exist for itself. . . . Local government exists to provide for the welfare of its people."

reside and to which sovereign entities they must look for adequate services.[22]

The Preamble to the Constitution of the United States is a clear expression that the *People of the United States* be given the protection of justice, tranquillity, defense and welfare, common to them, from which no inference can be drawn that the Federal Government should usurp the property of the states and their people on the pretext of protecting them. Our National Government protects the property of its citizens in foreign countries. The operation of such protection should in itself prove the point that full and complete dominion over property is unnecessary in exercising international affairs and common defense.

In our system of dual sovereignties, when a question arises as to which of the two has certain rights and powers, the usual and correct approach is to first determine whether such powers have been delegated to the Federal Government in the Constitution of the United States, or whether they can be implied from specific delegations.[23] Applying this rule, we request this Honorable Court to refer again to the nine powers now being exercised by the states (p. 12) in their marginal seas. Can it be said that any of such powers were specifically or impliedly delegated to the Federal Government by our Constitution? Can they be termed

---

[22]Woodrow Wilson, "Constitutional Government of the United States," at page 191:

> "It would be fatal to our political vitality really to strip the states of their powers and transfer them to the Federal Government."

[23]U. S. v. Williams, 194 U. S. 295; U. S. v. Butler, 297 U. S. 1, 63.

as necessarily "incident to" the Federal rights and powers in national defense and international affairs? Rather, isn't it true that those powers are of a local nature, come within the reservations of the Tenth Amendment, and may be exercised by the states so long as they interfere in no way with delegated Federal powers? Especially should this be the interpretation when the legislative branch of the Federal Government has indicated no desire whatever to enter the field now occupied by the nine listed state powers.[24]

It is respectfully urged that under no consideration should the Court decree "full" dominion and control over the disputed area within the State of California to the National Government, and that upon rehearing the paramount rights in and powers over the area should be limited to such dominion (control) as may be necessary for conducting defense of the country, international affairs, commerce, and other delegated paramount Federal powers.

III.

One hundred and seventy-one years of experience proves that error lies in the statement that "the state is not equipped in our constitutional system with the powers or the facilities for exercising the responsibilities which would be concomitant with the dominion which it seeks."

With due respect, the majority opinion shows a misconception of the division of powers between the state and nation and the actual powers being exercised by the state without any interference in the proper Federal dominion, in making this statement:

---

[24]Manchester v. Massachusetts, 139 U. S. 240, 257. Skiriotes v. Florida, 313 U. S. 69, 75.

> "The state is not equipped in our constitutional system with the powers or the facilities for exercising the responsibilities which would be concomitant with the dominion which it seeks."[25]

In this statement the majority is speaking of international affairs and national defense as though the state were seeking to exercise such Federal responsibilities. There is no evidence that California or any other state seeks such responsibilities. These responsibilities were delegated by the Constitution to the national sovereign, and the states have consistently refrained from interfering with the proper dominion of the Federal Government in such matters. Refer again to the nine listed powers (p. 12, supra) which the states are now exercising (not *"seeking"* to exercise). Which of those powers are the states not equipped to exercise? Over 171 years of experience in the exercise of these nine, or similar, powers indicate that the states are fully equipped under our constitutional system to handle such matters.[26] The lands have been used and controlled for local purposes continuously, with only occasional utility of such lands and resources to defend the shores and relieve national stress and emergency. If it could be held that the oil is a necessary incident to national defense, then certainly the taking of oil by the Federal Government (even with compensation) should be limited only to that needed for national defense.

All of the 52 former opinions of this Court, 244 State and Federal decisions, and the administrative decisions, which hold that the states own the soil beneath their navigable waters, recognize that such is a "qual-

---

[25]U. S. v. California, 67 S. Ct. 1658, 1667(14).

[26]See California Brief, pp. 35-42, 143-149.

ified" ownership, limited to uses which will not interfere with the constitutional regulatory powers of the Federal Government. These cases recognize no necessity for "full" or exclusive dominion in the Federal Government and show that there is no conflict with state dominion in all phases not incident to the exercise of the Federal powers.[27]

IV.

Within constitutional bounds, the extent of Federal dominion and regulatory control over lands and resources is a matter of policy for Congress to decide, and the court erred in expressing an opinion on rights and powers which Congress has refrained from asserting.

Except for rights which are necessarily incident to delegated or implied Constitutional powers, it is a fundamental rule of law that the Federal Government has no rights, power or dominion in internal affairs without assertion of same by the Congress.[28]

That full dominion and control over the disputed land is not necessarily incident to Constitutional powers of the Federal Government, is recognized by the following statement in the majority opinion:

> "For Article IV, Sec. 3, Cl. 2 of the Constitution vests in Congress 'Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to

---

[27]See Scott v. Lattig, 227 U. S. 229, 242-243, and cases therein cited.

[28]Manchester v. Massachusetts, 139 U. S. 240, 257; Skiriotes v. Florida, 313 U. S. 69, 75; U. S. v. Holt State Bank, 270 U. S. 49.

> the United States.' We have said that the constitutional power of Congress in this respect is without limitation. . . . Thus neither the courts nor the executive agencies, could proceed contrary to an Act of Congress in this *congressional area* of national power." 67 S. Ct. 1658, 1663(5).

Therefore, by this Court's own opinion, the issues in this case are within a field of Congressional authority, and since Congress has refrained from asserting exclusive power and dominion over the area as against the Constitutional rights of the states, the Court has erred in expressing an opinion limiting the rights of the states and preventing their functions in fields which Congress has not sought to enter.[29]

The only expressions from Congress on this subject have been two refusals to grant the Attorney General specific authority to file suit against California,[30] and passage of a Joint Resolution recognizing state ownership,[31] which was vetoed by the President in order that "ownership" might be decided by the Court in this

---

[29]U. S. v. Standard Oil Co., 67 S. Ct. 1604, 1612, rendered on same day as this opinion:

> "When Congress has thought it necessary to take steps to prevent interference with federal funds, property or relations, it has taken positive action to that end. We think it would have done so here, if that had been its desire. This it still may do, if or when it so wishes.
>
> "In view of these considerations, exercise of judicial power to establish the new liability not only would be intruding within a field properly within Congress' control and as to a matter concerning which it has seen fit to take no action."

[30]S. J. Res. 208, 75th Cong., 1st Sess. (1938). S. J. Res. 83 and 92, 76th Cong., 1st Sess. (1939).

[31]H. J. Res. 225, 79th Cong., 2d Sess. (1946).

case."[22] Since ownership was not decided in this Court's opinion, the entire matter is still up to Congress, unless this Court should upon rehearing follow the case of Pollard v. Hagan (44 U. S. 212) and the 52 other former decisions of this Court which indicate that "the Court then believed that the states . . . owned soils under all navigable waters within their territorial jurisdiction."

The Attorney General admits that the issues herein are matters for Congressional action when he suggests in his Memorandum in Support of Decree (p. 5) that future injunctive relief should be withheld until it can be "attuned to anticipated Congressional action"; as well as his opinion to the Secretary of Interior, August 29, 1947, that the lands in question cannot be leased or developed by a Federal agency unless Congress passes a statute authorizing same.

No Constitutional provision and no Act of Congress was mentioned in support of the majority opinion. The only policy of Congress before the Court was its indisposition for 171 years to interfere with state ownership of submerged lands. Upon rehearing, it is urged that the Court follow its former decisions upholding state ownership or dismiss the action, recognizing the appropriate statement of Mr. Justice Frankfurter in his dissenting opinion:

> "The determination . . . is a political decision not for this Court."

V.

The disputed property being within the admitted boundaries of California, the Court erred in applying

---

[22]92 Cong. Rec. 10660 (1946).

international law rather than the Constitution and law of the United States in determining the extent of the power and control due the Federal as against the State Government.

The above statement should not require discussion or citation of authority. Admittedly, the marginal sea lands in dispute are within the established boundaries of California at the time of its admission into the United States.[33] Therefore, the issues herein concern internal affairs and should not have been answered by application of international law or rules of external sovereignty.[34]

The majority opinion does not refer at all to the Constitution or rules of domestic law in determining whether the state is entitled to any powers or dominion within the disputed area. On the contrary, the majority bases its opinion on the dictum of several cases which relate wholly to the powers of the Federal Government in external affairs.[35]

The opinion in U. S. v. Curtiss-Wright, supra, supports our contention of error. From pages 219-220, we quote:

> "It will contribute to the elucidation of the question if we first consider the differences be-

---

[33]Government's Complaint, Par. II; Art. XII, Sec. 1, California Constitution of 1849.

[34]Chief Justice Marshall, Johnson v. McIntosh (1823), 8 Wheat. 543, 572. Mr. Chief Justice Hughes in Skiriotes v. Florida (1941), 313 U. S. 69, 72-73, stated that "International law" can have no concern with "domestic rights and duties."

[35]U. S. v. Curtiss-Wright Export Co., et al., 299 U. S. 304. Jones v. U. S., 137 U. S. 202.

tween the powers of the federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs. That there are differences between them, and that these differences are fundamental, may not be doubted.

"The two classes of powers are different, both in respect of their origin and their nature. The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. In that field, the primary purpose of the Constitution was to carve from the general mass of legislative powers *then possessed by the states* such portions as it was thought desirable to vest in the federal government, leaving those not included in the enumeration still in the states."

The majority refers to the ocean, rules of external powers, "open sea," "the subject of international dispute and settlement,"[36] as if there were no distinction between the marginal sea within state boundaries and that part of the ocean lying outside the boundaries of the state and nation. The Constitution and domestic law apply to the former, and international law to the latter.[37] Clearly, there is a difference insofar as the federal rights and powers extend. As stated by this Court in Louisiana v. Mississippi, 202 U. S. 1, 52:

"The Maritime belt is that part of the sea which, *in contradistinction to the open sea,* is under the

[36]U. S. v. California, 67 S. Ct. 1658, 1666-67.
[37]U. S. v. Curtiss-Wright Export Co., supra.

> sway of the riparian States, which can exclusively reserve the fishery . . . for their own citizens, whether fish, or pearls, or amber, or other products of the sea."

Again, this Court said in Rhode Island v. Massachusetts (1828), 12 Peters, 657, 733:

> "It follows that when a place is within the boundary, it is a part of the territory of a state; title, jurisdiction and sovereignty are inseparable incidents, and remain so 'til the state makes some cession."

Therefore, insofar as it relates to that portion of the sea within the boundaries of California, the following conclusion of the majority is in error:

> "And insofar as the nation asserts its rights under international law, whatever of value may be discovered in the seas next to its shores and within its protective belt, will most naturally be appropriated for its use."

This rule of international law may be correct insofar as it relates to that part of the ocean outside of and beyond the boundaries of the state and nation, but it is respectfully urged that the Court has erred in applying the rule to internal affairs and relative rights and powers of the state and nation in that portion of the sea within the state's boundaries.

VI.

The Court erred in failing to follow the rule of fifty-three former Supreme Court decisions holding that the respective states own all lands beneath navigable waters within their boundaries, and in attempt-

ing for the first time to limit such rule to inland waters.

Since paramount rights of the Federal Government in national defense and external affairs are in the nature of eminent domain and do not concern ultimate ownership of the land,[38] it was error for the Court to hold that such paramount rights defeat California's claim of ownership. Since the right to take resources from beneath the soil is a recognized property right attached to ownership of the soil,[39] the ultimate decision in this case should have been controlled by established rules of property law instead of by federal powers which are paramount to and do not require ownership.

It is surprising that the majority does not apply a single case of domestic property law in arriving at its conclusion that California does not own the land and resources in controversy.

If there were a federal statute saying, "The states own soils under all navigable waters within their territorial jurisdiction," it would be controlling of all issues in this case; and California would be held to

---

[38]Pollard, et al., v. Hagan, et al. (1845), 44 U. S. 212, 222, 3 How. 212, 220, 11 L. Ed. 565:

> "The right which belongs to the society, or to the sovereign, of disposing, in case of *necessity*, and for the *public safety*, of all the wealth contained in the State, is called the *eminent domain*."

The right in a state of eminent domain is distinct from and *paramount to* the right of ultimate ownership. Kohl v. U. S. (1875), 91 U. S. 367, 23 L. Ed. 449. This power is "needed for forts, armories and arsenals, for navy yards and lighthouses" and for "other public purposes."

[39]Brown v. Spillman, 155 U. S. 665, 670; Ohio Oil Co. v. Indiana, 177 U. S. 190, 202.

own the disputed land, because it is admittedly beneath navigable waters and within the state's boundary.

We submit that for over 100 years the above statement has been the law of this country through court decisions which should not be overruled on the grounds of dictum or by attempted limitation of the rule to inland waters. Even if dictum, and if the majority is correct in saying the question is now "squarely presented for the first time," the former decisions have established a rule of property law that this Court should follow instead of reasoning out a new theory for the first time.[40]

The majority opinion recognizes the rule of property law in the following words:[41]

> "As previously stated this Court has followed and reasserted the basic doctrine of the Pollard case many times. And in doing so it has used language strong enough to indicate that the Court *then believed that* states not only owned tidelands and soil under navigable inland waters, but also owned soils under all navigable waters within their territorial jurisdiction, whether inland or not. . . ."

The Pollard case is cited with approval in 52 Supreme Court decisions and 244 Federal and State Courts and has been consistently followed for 100 years without dissent.[42]

The attempt of the majority to limit the rationale

---

[40]See U. S. v. Guaranty Trust Co., 33 F. (2d) 533, affirmed 280 U. S. 478; 15 C. J. 953.

[41]U. S. v. California, 37 S. Ct., 1658, 1667.

[42]See Sheppard's Citations.

of this line of cases to inland waters is contrary to the decisions themselves and conflicts with the majority's own interpretation of the breadth of the rule as quoted above.

The history of this rule, as revealed by the cases, clearly negatives any intention that the rationale apply only to inland waters. In fact, the entire rule in the common law began with the sovereign's ownership of the adjoining sea and was extended to inland waters as "arms of the sea,"[43] thus forming one rule of ownership applicable to all navigable waters, without any distinction as to whether inland or seaward.

The history of this rule as coming from ownership of lands under the adjoining sea and extending to other navigable waters as "arms of the sea" is clearly stated in the following texts:

Gould on Waters (Chicago 3rd Ed. 1900):

> "The rule of the modern common law, whereby the king has a private interest, apart from the

---

[43]In 1610, in The Case of the Royal Fishery of the River Banne, Dav. 55, 80 Eng. Rep. 540, the Privy Council, said:

> "The reason for which the king hath an interest in such navigable river, so high as the sea flows and ebbs in it, is, because such river participates of the nature of the sea, and is said to be a branch of the sea so far as it flows; 22 Ass. p. 93, 8 Ed. 2, Fitz. Coron. 399, and the sea is not only under the dominion of the king (as is said 6 R. 2, Fitz. Protect. 46. The sea is of the ligeance of the king as of his Crown of England;) but it is also his proper inheritance; and therefore the king shall have the land which is gained out of the sea, Dyer 15 Eliz. 226, b. 22 Ass. p. 93. . . . And that the King hath the same prerogative and interest in the branches of the sea and navigable rivers, so high as the sea flows and ebbs in them, which he hath in alto mari, is manifest by several authorities and records."

ownership of the adjoining lands, in those tide waters which are *within* the territory of England, appears to be connected historically with the above claim of sovereignty over the sea, and to be derived therefrom. (p. 7)

". . .

"Those rivers and parts of rivers in which the tide ebbs and flows are known as 'navigable' rivers, and by the common law they are vested *prima facie* in the Crown. Hence, as was said in an early case, 'all navigable rivers in England appertain to the king.' They are arms of the sea, and the king has them because they partake of its nature. This ownership is for the public benefit, and in this country each State, as sovereign, has succeeded to the rights which the king formerly possessed in such rivers and in the soil beneath." (p. 100)

1 Kinney, *A Treatise on the Law of Irrigation and Water Rights* (San Francisco, 2nd Ed. 1912) 526:

"Waters subject to the influence of the tide are considered arms of the sea, and the ownership is in the Crown because they partake of its nature. . .

"The rule in the United States as to the ownership of the beds of tide waters is similar to the present rule in England. The title is in the respective States where or through which such waters lie or run; each State, as sovereign, has succeeded to the rights which the Crown formerly possessed in all such waters, and in the soil underneath the water itself."

This common law rationale has been followed con-

sistently heretofore by this Court, recognizing that the only test for its application is not whether the waters are inland or seaward, but whether they are (1) navigable and (2) within state boundaries." A few examples follow:

Martin v. Waddell (1842) 16 Peters 367, 410, 415, after giving the derivation of the rule from the sea and its ultimate extension to all navigable waters, states:

> "For when the Revolution took place the people of each State became themselves sovereign, and in that character hold the absolute right to *all their navigable waters* and the soils under them . . . and they had the same dominion and propriety in the bays, and rivers, and *arms of the sea,* and the soil under them. . . ."

In Weber v. Board of Harbor Commissioners (1873), 18 Wall. 57, 66:

> ". . . the title to the shore of the sea, and of the arms of the sea, and in the soils under tide waters, is, in England, in the King, and in this country, in the state."

In Barney v. Keokuk, (1876) 94 U. S. 324:

"For exhaustive discussion of the rule and how it was extended from the sea to cover all navigable waters, see Shively v. Bowlby, 152 U. S. 1, wherein it is said:

> "In England, from the time of Lord Hale, it has been treated as settled that the title in the soil of the sea, or of arms of the sea, below ordinary high water mark, is in the King. . . . And upon the American Revolution, all the rights of the Crown and of Parliament vested in the several States, subject to the rights surrendered to the national government by the Constitution of the United States."

". . . In our view of the subject the correct principles were laid down in Martin v. Waddell, 16 Pet. 367; Pollard's Lessee v. Hagan, 3 How. 212, and Goodtitle v. Kibbe, 9 id. 471. These cases related to tide-waters, it is true; but they enunciate principles which are equally applicable to *all navigable waters.*"

In Illinois Central R. R. Co. v. Illinois (1892), 146 U. S. 387, p. 435-437:

"It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several States, belong to the respective States within which they are found, . . . subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the States. . . .

"The same doctrine is in this country held to be applicable to lands covered by fresh water in the Great Lakes over which is conducted an extended commerce with different States and foreign nations. These lakes possess all of the general characteristics of open seas, except in the freshness of their waters, and in the absence of the ebb and flow of the tide. . . .

". . . by the common law, the doctrine of the dominion over and ownership by the crown of lands within the realm under tide waters is not founded upon the existence of the tide over the lands, but upon the fact that the waters are navigable, . . .

"We hold, therefore, that the same doctrine as

to the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies, which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tide waters on the borders of the sea, and that the lands are held by the same right in the one case as in the other, and subject to the same trusts and limitations. . . ."

Chief Justice Hughes said in Borax Consolidated v. Los Angeles (1935), 296 U. S. 10, 15:

"The soils under tide-waters within the original states were reserved to them respectively, and the states since admitted to the Union have the same sovereignty and jurisdiction in relation to such lands within their borders as the original states possessed; . . ."

Chief Justice Hughes said in Ashwander v. Tennessee Valley Authority (1936), 297 U. S. 288, 337:

"Pollard v. Hagan, 3 How. 212, Shively v. Bowlby, 152 U. S. 1, and Port of Seattle v. Oregon-Washington R. Co., 255 U. S. 56, dealt with the title of the States to tidelands *and the soil under navigable waters within their borders.* See Borax Consolidated v. Los Angeles, 296 U. S. 10, 15."

That the rule should be applied differently to lands beneath the marginal sea because of its strategic position in defense and external affairs was specifically negatived by Mr. Justice Holmes in the case of U. S. v. Chandler-Dunbar Co. (1908), 209 U. S. 447.[45]

---

[45]For full discussion of this case, see California's Petition for Rehearing, pp. 12-15.

Many inland waters are much nearer a foreign power and partake more of areas of international affairs than the marginal sea of the coastal states. Witness the Rio Grande River, between Mexico and the United States, and the St. Marys River and the Great Lakes between Canada and the United States. Heretofore, "dangers incident to location" of the overlaying waters (inland or seaward) have never been held to justify any difference in application of the general rule of state ownership of lands under *all* their navigable waters.

The history of this rule, its origin from the sea and extension to inland waters as arms of the sea, perhaps accounts for the absence of any previous challenge of state ownership in that area which gave birth to the rule itself. Also, this accounts for the fact that the rule is always stated broadly enough to cover *all navigable waters* within state boundaries, even when the particular case involves only inland waters.

It is frequently the case that dicta is confused with and erroneously separated from the controlling issue and rationale of a judicial controversy. No better example could be found than that in the case of Manchester v. Massachusetts.[46] It was suggested by the Plaintiff in its brief on the merits, pp. 156 and 157, that, because the offense occurred in Buzzard's Bay, the Manchester opinion had no bearing on rights within the three-mile limit. The important point dealt with by the Court in that case was not that the offense occurred in a bay, but that the illegal fishing for which Manchester was convicted occurred in navigable waters *within the three-mile limit,* and so the case stated in express language.

---

[46]139 U. S. 240 (1891).

The important point to remember is that this Court, in its former decisions, has not affirmed the title of the several states to submerged lands on the basis of their location in inland navigable waters but because they were located in the *navigable* waters of such states. We do not understand that the application of a broad principle to a local situation is dictum but the actual law in the case.[47] Consequently, it is erroneous to refer to the case of Pollard v. Hagan, supra, as establishing an "inland water rule." It is a rule that applies to submerged lands in *all navigable waters* of the state. If the title of the state to lands lying beneath the waters of some navigable bayou within the inland territory of Louisiana is sustained on the basis of the state's inherent sovereignty, it could not be said that the decision in such case establishes a "bayou rule," but gives expression to the only legal principle that is applicable.

Even if the former decisions are dicta and the question is here for the first time, they should be followed as they were by this Court when title to the Great Lakes ("open sea") was determined for the first time in Illinois Central Railroad Co. v. Illinois, 146 U. S. 387 (1892).[48]

Also, it is believed that the Court should follow its former rule of giving at least persuasive weight to the

---

[47]Screws v. U. S., 325 U. S. 91, 112-113; Helvering v. Fitch, 309 U. S. 149, 156; Dean Keeton on "Federal and State Claims to Submerged Lands," 25 Tex. Law Rev., Jan., 1947, pp. 262, 269.

[48]See U. S. v. Guaranty Trust Co., 33 F. (2d) 533, affirmed 280 U. S. 478; 15 C. J. 953.

244 State and Federal decisions,[49] many of which are directly in point.[50]

VII.

By basing its opinion on the assumption that the three-mile limit was unsettled when this nation was formed, the Court erred in refusing to recognize the title of the Original States to *any* lands in their respective maritime belts.

The majority opinion refuses to uphold ownership in the original colonies of the territories constituting their respective maritime belts, because of its assumption that the *extent* of the ownership of the several colonies in the marginal sea belt prior to the formation of this nation was unsettled.

This passage seems to assume that the only alternative to a settled three-mile limit was *no* ownership to *any* extent by the respective states in the adjoining marginal seas, *disregarding the fact* that the three-mile limit was established *as a minimum* and what was unsettled was only *the extent* of the breadth of ownership and *not* the fact of ownership.[51]

---

[49]See California Brief, pp. 112-114.

[50]In Martin v. Waddell, 16 Peters 367, 418 (1842), when first deciding the rule of state ownership of lands under navigable waters, the Justices said a previous state court decision, Arnold v. Munday, 1 Halstead (6 N. J. Law) 1, 74 (1821) was "unquestionably entitled to great weight."

[51]It is true that shortly after we became a nation our statesmen became interested in emphasizing the necessity for a definite *minimum* marginal zone in the marginal sea, there to protect our neutrality. The three-mile limit imposed by Jefferson was laid down as a *minimum* neutrality limit against other nations. It was not a claim of ownership as against the states but a warning and protectionary measure *on their behalf* by the Federal Government as their defender in international affairs.

The *precise breadth* of the seaward boundary of the states was not frequently called into question in the early years of the Republic, but the fact remains that the language in the early colonial charter grants conveyed to the colonies the "adjoining seas."

> For example, the 1584 Raleigh grant conveyed the "Royalties . . . as well *marine* as other within the saide landes . . . or the seas thereunto adjoyning."

The 1611 Virginia charter granted the soils, minerals, etc.

> "both . . . upon the main, and also within said islands and seas adjoining."

Each of the other colonial charters and patents did likewise.[32]

Immediately following the formation of the Original States, each of them commenced and *continued* to enact legislation exercising rights of ownership and jurisdiction in the marginal sea, one example being a 1798 Act of the Rhode Island General Assembly prohibiting any person from keeping more than two lobster pots "upon or within three miles of any of the shores of this state."[33]

So that from the very beginning, and in their charter grants, the colonies claimed ownership in the "adjoining seas." By the Treaty of Peace with Great Britain in 1783, the Colonies received "full propriety and territorial rights of the same."

---

[32]See the early charters set forth in Appendix E to Brief for the State of California.

[33]Other examples are set forth in Appendix E to Brief for the State of California.

The breadth of their claim may have become *more* definitely established with the passage of time. The *extent* of the *recognition* of the breadth of their claim and ownership in the "adjoining seas" may have varied, *but the fact* of their claim and ownership remained.

The majority opinion disregards and fails to recognize the ownership by those several original states, whether their ownership extended six miles or three miles from low-tide. The majority opinion *constricts* the breadth of the ownership of those original states to a maritime boundary of low-tide. The majority opinion fails to recognize state ownership of those lands in the marginal seas, *whatever the breadth,* which the Original Colonies indisputably received by charter grants. Thus for finally being limited to a minimum of three miles, the majority opinion holds that the Original States lose all rights and title to those territories.

When the Federal Government participated in the establishment of the international recognition of the *minimum* limit of three miles, it did so *in behalf of* the several states and *not* in derogation or usurpation of their rights.

The only dominion asserted by the United States as a nation, or by it claimed as needed, in the marginal sea, prior to 1937, concerned the exercise of jurisdiction to control water, *not land,* for national defense and to place the Federal Government in a position to carry out its constitutionally defined regulatory powers.

CONCLUSION

It is respectfully urged that the petition for rehearing should be granted and that the majority opinion should be reversed on the grounds set forth herein; or in the alternative, that the petition should be granted and the case set for rehearing and further argument.

Respectfully submitted,

THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

COMMITTEE ON THE BRIEF:

WALTER R. JOHNSON,
Attorney General of Nebraska, Chairman,

CLARENCE A. BARNES,
Attorney General of Massachusetts,

PRICE DANIEL,
Attorney General of Texas,

HUGH S. JENKINS,
Attorney General of Ohio,

FRED S. LE BLANC,
Attorney General of Louisiana,

EDWARD F. ARN,
Attorney General of Kansas.

Also of Counsel:

NATHAN B. BIDWELL,
GEORGE P. DRURY,
Assistant Attorneys General of Massachusetts,

ELTON M. HYDER, JR.,
Assistant Attorney General of Texas,

ORRIN G. JUDD,
New York City,

JOHN L. MADDEN,
Special Assistant Attorney General of Louisiana,

A. B. MITCHELL,
Lately Attorney General of Kansas,

Dated: October 1, 1947.